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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 431

UNITED STEELWORKERS OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion in the United States Court of Appeals for the Seventh Circuit (R. 82-116) is reported at 170 F. 2d 247. The decision and order of the National Labor Relations Board (R. 1-25) is reported at 77 N.L.R.B. No. 1.

JURISDICTION

The decree of the court below was entered on October 28, 1948 (R. 118-120). The petition for a

writ of certiorari was filed on November 24, 1948, and granted on January 17, 1949 (R. 125). The jurisdiction of this Court rests on 28 U.S.C. 1254, and Sections 10 (e) and (f) of the National Labor Relations Act.

STATUTE INVOLVED

Sections 9 (f), (g) and (h) of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. Supp. I, 141, *et seq.*), are set forth at pages 138-140 of the Brief for Appellee in *American Communication Association* v. *Douds*, No. 336, this Term.

STATEMENT

On January 8, 1947, prior to amendment of the National Labor Relations Act, following the usual proceedings under Section 10 of the Act, the Trial Examiner issued an Intermediate Report in a case known upon the records of the Board as *In the Matter of Inland Steel Company and Local Unions Nos. 1010 and 64, United Steelworkers of America (CIO)*, Case No. 13-C-2836 (R. 27-55). The Trial Examiner found that the company had violated Sections 8 (1) and (5) of the Act by refusing to bargain collectively with the Union concerning pension and retirement policies, and recommended that the Board order the company to cease and desist from its unfair labor practices (*ibid.*).

The amendments to the National Labor Relations Act, including Sections 9 (f), (g) and (h), became effective on August 22, 1947. Thereafter, on April 12, 1948, the Board issued its decision and

order in Case No. 13-C-2836 (R. 1-26). The Board, like the Trial Examiner, found that the company had violated Sections 8 (1) and (5) of the Act, and, to remedy the unfair labor practice, ordered the company to bargain collectively with the Union concerning its pension and retirement policies; to refrain from taking unilateral action with respect to these subjects; and to post appropriate notices. To effectuate the policy contained in Sections 9 (f), (g) and (h), however, the Board conditioned its order upon compliance by the Union with provisions of those Sections, within 30 days from April 12, 1948 (R. 20-22).

In thus conditioning its order upon compliance by the charging Union with the provisions of Sections 9 (f), (g) and (h), the Board followed the procedure established in *Matter of Marshall & Bruce Co.*, 75 N.L.R.B. 90. There the Board pointed out that the limitations upon the exercise of its powers which are contained in Sections 9 (f), (g) and (h) were intended to accomplish the objective of withholding the benefits of the Act from labor organizations which failed to comply with these provisions. The Board further noted that the statute expressly prohibits certification of a labor organization which has not complied. Since an order requiring an employer to bargain with a labor organization operates, in effect, "to place the Union in the position of a newly certified bargaining representative" (75 N.L.R.B. at p. 95), and "is often tantamount in practice to a certification"

(*ibid.* at p. 96), the Board believed that it would be inconsistent with the structure and incompatible with the policy of Sections 9 (f), (g) and (h), to enter such an order where the union involved, although accorded a reasonable opportunity to do so, failed or refused to comply. The Board stated (75 N.L.R.B. at p. 96):

> We cannot believe that Congress intended the full force of Government to be brought to bear upon an employer to require him to bargain in the future with a Union which we now lack the authority to certify. Therefore, inasmuch as this Union has not complied with Section 9 (f), (g), and (h) and is not presently qualified for certification as bargaining representative, our remedial order in this proceeding shall in part be conditioned upon compliance by the Union with that Section of the amended Act, within 30 days from the date of the order herein

On May 14, 1948, the Union filed with the Board a document entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board," in which the Union requested the Board to amend its order by making it unconditional. In support of its request, the Union alleged that Section 9 (h) of the amended Act is unconstitutional, and that the Union had complied with the only valid conditions contained in the order, namely, those relating to Section 9 (f) and (g). (R. 56-60.)

On May 17, 1948, the Board issued an order denying the Union's request, and stating as follows (R. 62-63):

> On May 14, 1948, the Union filed with the Board a document entitled "Return by United Steelworkers of America to Conditional Order of National Labor Relations Board." So far as here material, the Union alleges that it has complied with the requirements of Section 9 (f) and (g) of the Act as amended within the time limitation prescribed by the Board's Decision and Order and the Rules and Regulations of the Board, and that it has not complied with the requirements of Section 9 (h) of the Act as amended for the sole reason that the provisions of Section 9 (h) are illegal, unconstitutional, and void, in that, in specified respects they violate Article I, Section 9 (3) of the Constitution of the United States and the First, Fifth, Ninth and Tenth Amendments to the Constitution. Asserting that it has thus complied with all the legal conditions prescribed in the Board's Decision and Order of May 12, 1948, the Union requests that the Board now make its said Order unconditional.
>
> Upon due consideration of the matter, the Board believes that the Union's request for an amendment rendering the Board's Order unconditional must be, and it hereby is, denied. In the absence of authoritative judicial determination to the contrary, the Board assumes the constitutional validity of the provisions of the amended act.

On June 3, 1948, the Board denied motions filed by the Union on May 21, and by the Company on May 24, for enlargement of time for the Union's compliance with Section 9 (f), (g) and (h).

On April 30, 1948, Inland Steel Company filed in the court below a petition to review the Board's order insofar as it required the company to bargain with the Union (R. 64). On June 9, 1948, United Steel Workers of America filed a petition to review and set aside the condition contained in the order (R. 64). On September 23, 1948, the court below issued its decision holding that the Board's order requiring the company to bargain with the Union was valid and proper,[1] and further holding, Judge Major dissenting, that Section 9 (h) was constitutional and that the Board properly conditioned its order upon compliance by the Union with Section 9 (h) (R. 82-116). On October 28, 1948, the court below entered its decree enforcing the Board's order but modifying the condition contained therein by extending the time available for compliance by the Union with Section 9 (h) (R. 119), until "thirty (30) days from the date of this Decree, (or, in the event that the Union shall file a petition for a writ of certiorari in the Supreme Court of the United States within the time limited by law, then within thirty (30) days

[1] This Court has pending before it a petition for certiorari seeking review of the decision below with respect to this issue, No. 435, this Term.

after the denial of such petition, or, if said petition be granted, within thirty (30) days after the issuance of the mandate of the Supreme Court of the United States in the proceedings upon said writ of certiorari)."

ARGUMENT

1. Apart from their contention that Section 9 (h) is unconstitutional and that the condition requiring compliance with that Section is therefore invalid, petitioners do not challenge the propriety of the Board's action in conditioning its order upon compliance by the Union with Sections 9 (f), (g) and (h). Indeed, the Union complied, within the time allotted by the Board, with the provisions of Sections 9 (f) and (g) (*supra*, p. 4). That the Board acted properly and within the scope of its discretion in conditioning its order upon compliance by the Union with Section 9 (f), (g) and (h), thereby effectuating the policy of those Sections, is, we think, beyond dispute.

As the Board noted in the *Marshall & Bruce* case, *supra*, an order requiring an employer to bargain with a union is, in practice, tantamount to a certification of the union as exclusive bargaining representative. Since the Board is precluded by the terms of the Act from certifying a union which fails or refuses to comply with the provisions of Sections 9 (f), (g) and (h), failure to condition the effectiveness of a bargaining order upon compliance would result in according prohibited status

to such organizations. The procedural limitations contained in Sections 9 (f), (g) and (h), as the Board also noted, *supra*, p. 3, embody a Congressional policy to induce labor organizations to comply with the requirements of those Sections by denying to non-complying unions the benefits resulting from access to Board facilities. If non-complying labor organizations were permitted to enjoy the benefits of a bargaining order obtained through Board facilities this policy would, *pro tanto*, fail of accomplishment.

The Board, of course, is charged with the obligation of so framing its orders as to effectuate the policies of the Act. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 192-193, 194, 200; *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31, 47; *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U. S. 9, 18-19. Since its order to bargain looks to the future and governs a prospective relationship, the Board acted properly in conforming its order to the Congressional policy in effect at the time of its issuance. Cf. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421, 431-432; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464; *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184, 208.

The courts, as well as the Board, have conditioned enforcement of bargaining orders issued before amendment of the Act upon compliance by the

union involved with Sections 9 (f), (g) and (h). In *National Labor Relations Board* v. *Brozen*, 166 F. 2d 812, 813-814 (C.A. 2), the Board, after amendment of the Act, sought enforcement of an order which had been issued prior to the effective date of the amendments, and which required the employer to bargain with a union which had not as yet complied with the filing and reporting provisions. In its opinion in that case the court said:

> * * * since enforcement by the court of the order to bargain looks to the future, the policy evidenced by section 9 (f), (g) and (h) precludes enforcement unless the union shall comply with the requirements of those sections. The Board concedes this to be true and requests the court to modify section 1 (a) and 2 (a) of the Board's order to provide that those provisions shall be effective only if the union shall comply with sections 9 (f), (g) and (h) of the National Labor Relations Act, as amended by the Labor Management Relations Act within 30 days after entry of the court's order. Accordingly the order of the Board is so modified.

In *Times Mirror Company* v. *N.L.R.B.*, (C.A. 9), No. 10123, decided May 17, 1948, the court, over objection by the union involved, granted the Board's motion to dismiss without prejudice a petition to adjudge the employer in contempt of a bargaining order which had been entered prior to amendment of the Act, where the charging union

had failed to comply with the provisions of Section 9 (f), (g), and (h).

Since the Board properly conditioned its bargaining order upon compliance by the Union with Section 9 (h), its order is valid unless Section 9 (h) itself is unconstitutional. Cf. *National Maritime Union* v. *Herzog*, 334 U. S. 854.

2. The posture of this case demonstrates even more clearly the point made in the Government's brief in *American Communications Association* v. *Douds*, No. 336, pp. 64-79, that Section 9 (h) does not deprive any labor organization, or officer thereof, of any pre-existing private right. For the sole consequence of the application of Section 9 (h) in this case is that petitioner is denied the benefit which it would derive from enforcement of the Board's order requiring the company to bargain concerning pension plans. On no theory do petitioners have a private right to the benefits of such an order. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265; *Jacobsen* v. *National Labor Relations Board*, 120 F. 2d 96, 99-100 (C.A. 3). Moreover, absent such an order, the union remains free to strike to compel the company to bargain with it concerning pensions, as well as all other issues appropriate to collective bargaining.

3. Petitioners call attention, at the outset of their brief, to the fact that Article III, Section 4, of the Constitution of the United Steelworkers of America, CIO, bars from eligibility to any union office,

anyone "who is a member, consistent supporter, or who actively participates in the activities of the Communist Party" (Br. p. 7), and assert that "Mr. Murray and other influential leaders of the CIO [are] effectively combatting communist influences in unions" (p. 7-8). Petitioners, however, do not suggest that by this provision and in these activities Mr. Murray and the CIO are engaged in a campaign to suppress political unorthodoxy or to stifle effective expression of political views which they find unacceptable. In the light of Mr. Murray's statements quoted on pp. 41-42 of our brief in No. 336, concerning the potentially devastating effect of Communist leadership upon the legitimate activities of the American trade-union movement, and upon the unions themselves, petitioner would undoubtedly resent any suggestion that bigotry or intolerance explain the Union's exclusion of Communists from office. Yet, petitioners, while recognizing for their own purposes the intimate relation between affiliation with the Communist Party and abuse of the powers of union office, persist in denying the existence of this relationship when they discuss the basis for the Congressional action which they here attack (Br. 26). Thus, petitioners assert, "the statute strikes directly at the freedom of belief, speech, and political activity of union officers. And persons who have exercised these constitutionally protected freedoms in a fashion inacceptable to Congress are, in consequence of their unorthodoxy, denied yet another right essential to the

expression and effectuation of their beliefs—the right, if the membership agrees, to be an officer of a labor union. Thus they are excluded from the very positions in which they might give effective expression to their views—and that, of course, is why they are excluded."

The effect of Section 9 (h) upon persons who desire to hold union office is, even on petitioners' theory, no greater than the effect of the union's own rule. If that rule does not "strike directly at the freedoms of belief, speech, and political activity of union officers," neither does Section 9 (h). And unless petitioners are willing to assert that Communists are denied office in the United Steelworkers Union only because, as officers, "they might give effective expression to their views," views which the union disapproves merely because of their "unorthodoxy," it comes with poor grace from petitioners to attribute such motives to Congress. We submit that the Union's own action in excluding Communists from office for legitimate trade union reasons reduces to polemics its charge (Br. 34), that Congress adopted Section 9 (h) "simply because it wanted to weaken the power of adherents of a party which it detested and distrusted."

Finally, petitioners' exclusion of members and adherents of the Communist Party from office in the Union refutes their argument that Congress could rationally deal with the evils inherent in the leadership of trade unions by Communists only by legislating against specific evil practices of union

leaders. What the Union did to cope with the threat to its existence speaks more loudly than what it now says. Congress, in acting to protect national interests against the very same dangers, is not restricted to less effective means.

For the reasons set forth in our brief in the *American Communications Association* case, we believe that ample basis exists for denying to labor organizations whose officers fail or refuse to file the affidavits contemplated by Section 9 (h) the benefits of Board orders such as that here involved. The judgment below should, therefore, be affirmed.

Respectfully submitted,

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